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ABSTRACT

The Family Educational Rights and Privacy Act of 1974 (commonly known as the Buckley Amendment) grants parents of students and eligible students the right to inspect, challenge, and, to some degree, control the release of information from a student's school or college file. The act provides for denial of federal funds to institutions that do not comply with its provisions. This paper, which is a point-by-point analysis of the provisions of the act, is intended to serve as a set of guidelines for school officials. Sections of this document, which conform to sections of the act itself, include definitions of terms, applicability of the act, inspection and review of education records, amendment of education records, restrictions on disclosure of personally identifiable information from education records, and enforcement of the act. (Author/DS)

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AN ADMINISTRATOR'S GUIDE TO THE BUCKLEY AMENDMENT

by

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AN ADMINISTRATOR'S GUIDE TO THE BUCKLEY AMENDMENT

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Student records are no longer considered to be confidential, according to the Family Educational Rights and Privacy Act of 1974, which became law on November 17, 1974. Commonly known as the Buckley Amendment because it was sponsored by Senator James Buckley (R-NY), the Act grants parents of students and eligible students the right to inspect, challenge, and, to some degree, control the release of information from a student's school or college file. The Act provides for denial of federal funds to institutions that do not comply.

Widespread concern and confusion regarding the ambiguities in the Buckley Amendment caused Senator Buckley to join Senator Claiborne Pell (D-RI) to sponsor clarifying amendments. Consequently, on December 19, 1974, Congress passed legislation necessary for revision and clarification.

The Department of Health, Education and Welfare, designated to administer the new statute, gave notice of a 60-day public comment period (from January 6, 1975, to March 7, 1975) and began the development of specific guidelines for compliance. The resulting HEW "Final Rule on Education Records" was published in the Federal Register on June 17, 1976.

Educators charged with any portion of the responsibility for the maintenance, storage, and use of educational records need specific guidelines to insure compliance with the terms of The Buckley Amendment. The following point-by-point analysis of the provisions of the Act seeks to provide those guidelines. The headings and subheadings employed here are directly from the outline of the Act itself. [1]

Subpart A--General

Section 99.1 Applicability of act.

The Act applies to all educational agencies or institutions which receive funds directly from the United States Office of Education or indirectly through fees paid by students who are recipients of any Office of Education funding program. It applies to education records of students who are or have been in attendance at the educational institution which maintains the records, but it does not apply to records of applicants for admission who were never in attendance.

Section 99.2 Purpose.

The purpose of the Act is to determine and state requirements governing the protection of privacy of parents and students with respect to education records.

Section 99.3 Definitions.

Definitions of key terms essential to the interpretation of the Act include:

Act means the General Education Provisions Act, Title IV of Public Law 90-247, as amended. Title IV of the Act is that portion commonly known as the Buckley Amendment.

Attendance includes, but is not limited to (a) attendance in person or by correspondence, and (b) the period during which a person is working under a work-study program.

Commissioner means the U.S. Commissioner of Education.

Directory information may include the following student information:

student's name, address, telephone number, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, the most recent previous educational agency or institution attended, and other similar information as determined by the student.

Disclosure means permitting access to or any communication of education records of the student or the personally identifiable information contained in the education records by any means to any party.

Educational institution means any public or private institution which is the recipient of funds through the U.S. Office of Education. The term refers to the institution as a whole, including all its components (such as schools or departments in a university).

Education records means those records which are (1) directly related to a student and (2) maintained by an educational institution or by a person acting for it. The term does not include:

(a) Records of instructional, supervisory, administrative, and certain educational personnel which are in the sole possession of the maker, and which are not accessible or revealed to any other individual except a substitute. A "substitute" is an individual who performs on a temporary basis the duties of the individual who makes the record.

(b) Records of a law enforcement unit of the institution which are maintained apart from other institutional records, maintained solely for law enforcement purposes, and not disclosed to individuals other than law enforcement officials of the same jurisdiction, provided that education records maintained by the institution are not disclosed to the personnel of the law enforcement unit.

(c) Records relating to an employee of an educational institution which are made and maintained in the normal course of business, relate exclusively to the individual's

capacity as an employee, and are not available for use for any other purpose. (Records of an individual who, while in attendance at the institution, is employed as a result of his or her status as a student are education records.)

(d) Records relating to an eligible student which are created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional, to be used only in connection with the provision of treatment to the student, and not disclosed to anyone other than individuals providing the treatment, provided that the records can be personally reviewed by an appropriate professional of the student's choice. "Treatment" does not include remedial or other educational activities which are part of the program of instruction at the institution.

(e) Records of an educational institution which contain only information relating to a person after that person is no longer a student at the institution (such as information collected on the accomplishments of alumni).

(f) Non-academic records kept by seminaries, schools, or departments of divinity or theology within colleges or universities and which contain information on the spiritual and psychological development of candidates for positions in a religious order pose complex constitutional questions not treated in the final regulations and must be considered on a case by case basis.

Eligible student means a student who has attained the age of eighteen or is attending a post-secondary educational institution.

Financial aid means a payment of funds to an individual (or a payment in kind of tangible or intangible property to the individual) which is conditioned on the individual's attendance at an educational institution.

Institution of post-secondary education means an institution which provides education to students beyond the secondary, or grade 12, level.

Panel means the body which will adjudicate cases concerning challenge of records.

Parent includes a parent, a guardian, or an individual acting as a parent of a student in the absence of a parent or guardian. The

institution may presume the parent has the authority to exercise the rights inherent in the Act unless it has been provided with legal evidence to the contrary (as in the case of divorce, separation, or custody).

Party means an individual, agency, institution, or organization.

Personally identifiable means data or information which includes: (1) the name of a student, the student's parent, or other family member; (2) the address of the student; (3) a personal identifier, such as a social security number or student number; or (4) a list of personal characteristics or other information which would make the student's identity easily traceable.

Record means any information or data recorded in any medium, including, but not limited to handwriting, print, tapes, film, microfilm, and microfiche.

Secretary means the Secretary of the U.S. Department of Health, Education, and Welfare.

Student includes any individual with respect to whom an educational institution maintains education records. The term does not include an individual who has not been in attendance at an institution; therefore one who has applied for admission is not a "student" until he has been in attendance at the institution. If an individual is or has been in attendance in one component unit of a post-secondary institution, his application for admission to a second component unit of that institution does not gain for him the right to inspect the records accumulated by the second unit until he has enrolled therein.

Section 99.4 Student rights.

Parents of student hold all rights under the Act until the student has attained the age of eighteen years or entered a postsecondary institution, after either of which the rights become those of the eligible student. In cases where the eligible student remains a financial dependent of the parents, both the eligible student and the parents may claim the rights provided.

Section 99.5 Formulation of institutional policy and procedures.

Each institution must formulate a written policy pertaining to education records and must, upon request, provide copies to parents of students and to eligible students. The written policy must:

(1) Inform parents of students and eligible students of their rights;

(2) Permit parents of students or eligible students to inspect and review the education records of the student, including at least

(a) A statement of the procedure to be followed to request to inspect and review the student's education record,

(b) A statement of the circumstances in which the institution may deny a request for a copy of such records (for example, even though the institution may not deny access to an education record, it can deny a copy of a record on which a financial "hold" exists)

(c) A schedule of fees for copies, and

(d) A listing of the types and locations of education records maintained by the institution with the titles and addresses of the officials responsible for those records;

(3) Inform parents of students and eligible students that no personally identifiable information from the education records will be disclosed without this prior written consent except where prior written consent is not required. In cases where prior written consent is not required (treated in Section 99.31), the policy must specify the criteria the institution will use for determining which parties are "school officials" and what is considered to be a "legitimate educational interest." A specification of the personally identifiable information to be designated as directory information must also be included;

(4) Provide for the maintenance of the record of disclosures of personally identifiable information from the education records of a student and permit a parent or an eligible student to inspect that record;

(5) Provide a parent of the student or the eligible student with an opportunity to seek the correction of education records of the student or place a statement in the education records of the student.

Section 99.6 Annual notification of rights.

Each educational institution must provide parents of students and eligible students an annual notice of the location where copies of the written policy (from Section 99.5) can be obtained. Any reasonable conveyance (annual catalog, bulletin, newsletter, student newspaper, etc.) of the notice is acceptable.

Section 99.7 Limitations on waivers.

Parents of students or an eligible student may waive any or all rights under the Act. Any waiver is subject to the following limitations:

(1) A waiver must be in writing and be signed by the parent or student, as appropriate.

(2) The institution may request a waiver, but it may not require it.

(3) An applicant for admission or a student in a postsecondary educational institution may waive the right to inspect and review confidential letters and confidential statements of recommendation if:

(a) The names of those providing such documents are given upon request;

(b) The documents are used only for the purposes for which they were originally intended;

(c) Such waiver is not required as a condition of admission or as a prerequisite for other institutional services or benefits.

All waivers in this category must be executed by the individual, regardless of age, rather than by the parent of the individual.

(4) A waiver may be executed with respect to specified classes of (a) educational records and (b) persons or institutions.

(5) A waiver may be revoked, but a student would be able to inspect only those documents placed in his or her education records after the date of revocation.

(6) The revocation of a waiver must be in writing.

(7) If a parent of a student executes a waiver, that student may revoke the waiver at any time after he or she becomes an eligible student.

Section 99.8 Fees.

An educational institution may charge a reasonable fee for copies of education records which are made for parents of students or eligible students. No fee may be charged, however, to search for or to retrieve the education records of a student.

Subpart B--Inspection and Review of Education Records

Section 99.11 Right to inspect and review education records.

Each educational institution must grant parents of students and eligible students access to inspect and review the education records of the student within 45 days of their request. The institution may require that a staff member be present during inspection and review, but the institution's representative must provide reasonable explanations and interpretations of the records when so requested. Copies of the records must be provided if failure to provide copies would effectively prevent a parent or eligible student from exercising the right to inspect and review the education records.

An educational institution may presume that either parent of the student has the authority to inspect and review the education records of the student unless it is provided with legal evidence to the contrary. In the absence of such evidence the institution is not required to exercise judgment over such matters as divorce, separation, or custody.

Section 99.12 Limitations on right to inspect and review education records at the post-secondary level.

An institution of post-secondary education is not required to permit a student to inspect and review the following records:

(1) Financial information submitted by parents;

(2) Confidential letters and confidential statements of recommendation which were placed in the education records of the student prior to January 1, 1975, provided these documents were collected under established policies of confidentiality and were used only for the purposes for which intended.

(3) Confidential letters or recommendations with respect to admissions, employment, or honors to which students have waived their right to inspect and review.

If the education records of a student contain information pertaining to more than one student, the parent of the student or the eligible student may inspect and review or be informed of only the specific information which concerns that student.

Section 99.13 Limitation on destruction of records.

An educational institution may destroy any education records it chooses so long as there is no outstanding request to inspect and review those destroyed. Explanations placed in the record by parents of students or eligible students and records of disclosures and requests for disclosures must be maintained so long as the basic record to which the explanation or request pertains is maintained.

Subpart C--Amendment of Education Records

Section 99.20 Request to amend education records.

The parent of a student or an eligible student may challenge any information in the student's education record if the parent or student feels that the information is inaccurate or misleading or in violation

of the privacy or other rights of the student. The educational institution must decide within a reasonable time whether to amend the record as requested. Should the institution decide against amending the record, the institution must inform the parent or the eligible student of the refusal and of the right to a hearing.

Section 99.21 Right to a hearing.

An educational institution must, on request, provide an opportunity for a hearing to consider a challenge of the content of an education record. If, as a result of the hearing, the institution agrees that the challenge is valid, it shall amend the record and so inform the parent or eligible student in writing. If the institution does not accept the challenge as valid, it must inform the parent or eligible student of their right to place in the education record a statement commenting on the challenged information in the record. Such a statement must remain a part of the education record so long as the record is maintained, and it must be made available to any party who sees the contested portion of the record to which it applies.

The right to a hearing may not be used to contest the assignment of a grade, but a hearing may be requested to contest whether the assigned grade was recorded accurately in the education records of the student.

Section 99.22 Conduct of the hearing.

When requested, the hearing must be held within a reasonable period of time, and the parent or the eligible student must be given reasonable advance notice of the date, place, and time. The hearing may be

conducted by any party, including an official of the institution, who does not have a direct interest in the outcome of the hearing. The parent or eligible student shall be afforded a full and fair opportunity to present relevant evidence and may be assisted or represented by one or more individuals of their choice (including an attorney) at their own expense.

The institution shall make its decision based solely on the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision, in writing, within a reasonable period of time after the conclusion of the hearing.

Subpart D--Disclosure of Personally Identifiable Information From Education Records

Section 99.30 Prior consent for disclosure required.

Except for disclosure to the parent of a student who is not an eligible student or to the eligible student, an educational institution must obtain the written consent of the parent of a student or the eligible student before disclosing personally identifiable information from the education records of a student. (Additional exceptions are directory information and the specific exceptions included in the next section, 99.31.) The institution may presume that the parent of the student or the eligible student giving consent has the authority to do so unless specific legal documents to the contrary have been made known to the institution.

The written consent must be signed and dated by the individual giving the consent and shall specify the records to be disclosed, the purpose or purposes of the disclosure, and the party, or class of parties,

to whom disclosure may be made. A copy of any record disclosed by virtue of written consent for such disclosure must be made available to the parent of the student or the eligible student if so requested.

Section 99.31 Prior consent for disclosure not required.

An educational institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is: (1) to officials and teachers of the institution who have legitimate educational interests: (2) to officials of other educational institutions in which the student seeks to enroll; (3) to authorized representatives of the Comptroller General of the United States, the Senators, the Commissioner, the Director of the National Institute of Education, or the Assistant Secretary for Education, or state educational authorities; (4) to administrators of financial aid; (5) to State and local officials to whom information is required to be reported by State statute adopted prior to November 19, 1974; (6) to educational research organizations, (7) to accrediting organizations, (8) to parents of a dependent student, (9) in compliance with a judicial order or lawfully issued subpoena, and (10) to appropriate parties in a health or safety emergency.

Section 99.32 Record of disclosure required to be maintained.

An educational institution shall maintain with the education records of a student a record indicating the parties who have requested or obtained personally identifiable information from the education records of

the student and the legitimate interests those parties had in requesting or obtaining the information. That record of disclosures may be inspected by the parent of the student or the eligible student.

The requirement of a record of disclosures does not apply to disclosures to a parent of a student or an eligible student, disclosures according to the written consent of a parent of a student or an eligible student when the consent is specific with respect to the party or parties to whom the disclosure is to be made, disclosures to school officials or to disclosures of directory information.

Section 99.33 Limitation on redisclosure.

An educational institution may disclose personally identifiable information from the education records of a student only on the condition that the party to whom the information is disclosed will not disclose the information to any other party without the prior written consent of the parent of the student or the eligible student.

Section 99.34 Conditions for disclosure to officials of other schools and school systems.

An educational institution which transfers to another institution the education records of a student who has made application to that other institution must make a reasonable attempt to notify the parent of the student or the eligible student of the transfer at the last known address of the parent or eligible student unless (1) the transfer was initiated by the parent or eligible student or (2) the institution includes a notice in its written policies on education records that it forwards education records on request to a school in which a student seeks or intends to enroll.

Section 99.35 Disclosure to certain Federal and State officials for Federal program purposes.

Certain Federal and State officials and agencies, as listed in Section 99.31 (a) (3), may have access to student and other records which may be necessary in connection with the audit and evaluation of Federally supported education programs or in connection with the enforcement of or compliance with the Federal legal requirements which relate to these programs. Except when appropriate prior written consent has been obtained or when the collection of personally identifiable information is specifically authorized by Federal law, any data collected should be protected in a manner which will not permit the personal identification of students and their parents by other than those officials, and personally identifiable data shall be destroyed when no longer needed for the specific purpose for which it was collected.

Section 99.36 Conditions for disclosure in health and safety emergencies.

An educational institution may disclose personally identifiable information from the education records of a student to appropriate parties in connection with an emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals.

Section 99.37 Conditions for disclosure of directory information.

An education institution which wishes to designate and disclose directory information shall give public notice of the categories of personally identifiable information included, the rights of the parent

or the eligible student to refuse to permit release of any or all directory information which pertains to that student, and the period of time within which the parent or the eligible student must inform the institution in writing that such directory information is not to be released for that student.

Subpart E--Enforcement

Section 99.60 Office and review board.

The Secretary is required to establish or designate an office and a review board to investigate, process, and review complaints of alleged violations. The address of that office is: The Family Educational Rights and Privacy Act Office (FERPA), Department of Health, Education and Welfare, 330 Independence Avenue, SW, Washington, DC 20201.

Section 99.61 Conflict with State or local law.

An educational institution which determines that it cannot comply with requirements of the Act because of conflict with State or local law must notify the office and review board within 45 days of any such determination.

Section 99.62 Reports and records.

Each educational institution shall submit reports and keep records pertaining to the Act as required by the Office of the Review Board.

Section 99.63 Complaint procedure.

Complaints regarding violations of rights accorded parents and eligible students by the Act shall be submitted to the Office in writing.

The Office will notify those involved in writing, investigate the complaints, and provide written notice of its findings to all involved. If an institution which has been notified of lack of compliance fails to take corrective steps, the matter will be referred to the Review Board for a hearing.

Section 99.64 Termination of funding.

After it has been determined that an institution has failed to comply with the regulations of the Act, all Federal funds which come to it through the U.S. Office of Education may be terminated on the recommendation of the Secretary if voluntary compliance is not forthcoming.

Section 99.65 Hearing procedures.

The Chairman of the Review Board shall designate Hearing Panels to conduct hearings necessitated by the complaint procedure.

Section 99.66 Hearing before Panel or a Hearing Officer.

The Hearing Panel Chairman determines whether a hearing will be conducted before the Hearing Panel or before a hearing officer he designates.

Section 99.67 Initial decision; final decision.

The decision resulting from a hearing is communicated in writing to the parties involved and to the Secretary. The initial decision from the hearing becomes the final decision of the Secretary, unless the Secretary makes known his intention to review the decision.

REFERENCE

[1]FEDERAL REGISTER, Vol. 41, No. 118, Thursday, June 17, 1976.